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In the
SUPREME COURT OF THE UNITED STATES
October Term, 1993

Paul Palalaua Tuilaepa (No. 93-5131), *Petitioner,*

v.

State of California, *Respondent.*

William Arnold Proctor (No. 93-5161), *Petitioner,*

v.

State of California, *Respondent.*

ON WRIT OF CERTIORARI TO THE
CALIFORNIA SUPREME COURT

RESPONDENT'S CONSOLIDATED BRIEF ON THE MERITS

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QUESTIONS PRESENTED

1. After death eligibility has been established by a unanimous jury verdict finding one or more valid special circumstances, are the sentencing factors listed in California Penal Code section 190.3, which assist and guide the jury in choosing between death or life imprisonment without possibility of parole, subject to the vagueness concerns of *Stringer v. Black*, 503 U.S. ___, 112 S.Ct. 1130 (1992)?

2. Once a defendant has been properly found to be eligible for the death penalty, may the jury at the penalty phase in California constitutionally consider sentencing factors which are not specifically labelled as either aggravating or mitigating?

3. Where the jury at the penalty phase has been specifically instructed to the contrary, does the prosecutor in a state capital case violate the Eighth Amendment by arguing that the absence of a mitigating factor can itself be an aggravating factor?

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STATEMENT OF THE CASE FOR PETITIONER PROCTOR

On the night of April 21, 1982, Petitioner, William Proctor, murdered 55-year-old Bonnie Stendal, a widow who taught first grade at the Burney Elementary School in Shasta County, California. Petitioner was 20 years old when he murdered Mrs. Stendal. Petitioner entered Mrs. Stendal's home in the evening and then beat, raped, tortured, and strangled her to death.

Petitioner tortured Mrs. Stendal by stabbing her repeatedly in her breasts. According to the pathologist, the curvature of some of these injuries indicated they had been inflicted slowly and deliberately. The torture occurred while Mrs. Stendal had been immobilized. Mrs. Stendal had also been severely beaten and raped more than once. Of the five injuries to her vagina, four had been made by a foreign object. Mrs. Stendal was murdered, first by nonfatal manual strangulation, later by ligature strangulation.

Petitioner then disposed of Mrs. Stendal's tightly bound body by dumping it over a cliff on a mountain road about 12 miles outside of Burney. Petitioner spent the day Mrs. Stendal's body was discovered buying concert tickets in Redding and drinking beer with a friend and two girls in a motel.

Petitioner was linked to the murder by a bloody palm print found on a magazine in Mrs. Stendal's bedroom. Petitioner's own lawyer, the public defender for Shasta County, described this palm print as "the most damning single piece of evidence I have ever seen." Proctor JA 51. The distinctive knots used to bind Mrs. Stendal were also linked to Petitioner as a result of a truck driving course he had taken.

After his arrest Petitioner told the police he had been at a friend's house on the evening of April 21. Petitioner lied to the police and told them he left his friend's house "at around 8:30, right after a baseball game came on," and that he "walked downtown" and "caught a ride home." He said he caught a ride with a guy in a Chevy pickup in front of a local market.

Petitioner also lied when he told the police he spent the remainder of the evening at home and went to bed at about 11 p.m. Petitioner told the police he got up at around 9 a.m. the next morning, and that he did not leave home until around 3:30 or 4 p.m. When the police asked Petitioner if he had gone to Mrs. Stendal's home the evening of April 21, he again lied and said he had *not* gone there.

After visiting her son in jail, Petitioner Proctor's mother told the police that Petitioner had asked her to lie and tell Detective Jarrett that he had spent the night of the murder at home. Mrs. Proctor told Petitioner

that she had already talked to Detective Jarrett and told him Petitioner had *not* spent the night at home. Petitioner then asked his mother if she would lie and tell Detective Jarrett that he had been at a party that night.

Petitioner was charged with murder, a violation of California Penal Code section 187, and with four special circumstances. One of these special circumstances alleged that the murder of Mrs. Stendal was "Especially heinous, atrocious, or cruel, manifesting exceptional depravity" (§ 190.2(a)(14)). Petitioner Proctor's motion to dismiss this special circumstance allegation was later granted.

On December 20, 1982, the jury returned a verdict convicting Petitioner of first degree murder, finding the three remaining special circumstances to each be true. Petitioner was also convicted of rape with great bodily injury and of first degree burglary with great bodily injury. A mistrial was declared when the jury was unable to reach a decision on penalty and after Petitioner sought a change of venue, the retrial of the penalty phase was moved to Sacramento County.

The prosecution called 13 witnesses, essentially the same witnesses used at the guilt trial. The defense briefly presented two witnesses, Petitioner's younger brother and his mother.

In his closing argument at the penalty trial, the prosecutor relied almost exclusively on the circumstances of Mrs. Stendal's murder to show that death was the appropriate punishment. The prosecutor spent the vast majority of his argument reviewing each of the charges, explaining the elements of each offense and of each special circumstance.

Although not required to do so under California law, the trial judge instructed the jury that they were required to use the "beyond a reasonable doubt" standard of proof before they could find any aggravating circumstance to be applicable to this case.

The prosecutor candidly acknowledged that in his view there were two mitigating circumstances in this case which included Petitioner's age [Pen. Code § 190.3(i)] and the lack of any prior violent criminal activity. Pen. Code § 190.3(b).

The prosecutor argued that the facts surrounding the torture murder special circumstance were the crux of his case that Petitioner should be sentenced to death.

The defense argued that the jury should not find the circumstances surrounding Mrs. Stendal's death to be an aggravating factor since the prosecution could not prove that she had not been killed before she was beaten, raped and tortured. Proctor JA 61-62. The defense also minimized Petitioner Proctor's three prior

felony convictions as youthful indiscretions, one involving an auto theft and the others involving the theft of beer from a pizza parlor. Proctor JA 62.

The defense responded to the prosecutor's brief argument that the jury could consider the absence of mitigation to be aggravation as to factors (d), (e), and (f) by claiming that these factors did not apply to the facts of this case and therefore could not be considered to be aggravating circumstances.

Although not required to do so by California law, the trial court at Petitioner Proctor's request, instructed the jury that:

> If a factor is not found by you to be a mitigating factor, that in and of itself does not make that factor an aggravating factor. In order for a factor to be considered an aggravating factor, you must be satisfied beyond a reasonable doubt that the factor does exist, and it is only if you determine that the factor exists beyond a reasonable doubt that you may consider the factor an aggravating factor.

Proctor JA 80.

The trial court then instructed the jury to consider, take into account and be guided by the sentencing factors, if they were applicable to this case. The court further instructed the jury that:.

If you conclude that the aggravating circumstances outweigh the mitigating circumstances, you shall impose a sentence of death. However, if you determine that the mitigating circumstances outweigh the aggravating circumstances, you shall impose a sentence of confinement in the state prison for life, without possibility of parole.

Proctor JA 79.

Although not required to do so, the trial court clarified the "shall" instruction by giving the following additional instruction at Petitioner's request:

In considering, taking into account, and being guided by the aggravating and mitigating circumstances, you may not decide the effect of such circumstances by the simple process of counting the number of circumstances on each side. The particular weight of such opposing circumstances is not determined by the relative number, but rather by their relative convincing force on the ultimate question of punishment.

The penalty phase jury returned a verdict finding that the aggravating circumstances outweighed the mitigating ones, and that death was the appropriate punishment.

On June 28, 1983, the Sacramento County Superior Court heard, considered, and denied

Petitioner's automatic motion for modification of judgment. Pen. Code § 190.4(e). Petitioner's appeal to the California Supreme Court followed automatically. The court issued its opinion affirming the conviction and penalty on December 28, 1992. Proctor JA 95-184.

STATEMENT OF THE CASE FOR PETITIONER TUILAEPA

On October 6, 1986, Petitioner, Paul Tuilaepa, and an accomplice entered a bar in Long Beach, California. Petitioner pointed a .22-caliber rifle in the face of the bartender and screamed that he wanted money. The bartender turned over his cash to petitioner. Then, Petitioner Tuilaepa and his accomplice split up and began robbing patrons at the bar.

Petitioner Tuilaepa took one customer's money from the bar counter. He pushed another customer against a vending machine and took a wallet containing cash. He shoved a third customer, taking from him a wallet and credit cards.

Meanwhile, petitioner's accomplice took money from at least three other patrons. But, when he pushed Melvin Whiddon and demanded his wallet, Melvin Whiddon struck the accomplice and knocked him down. At that point, Petitioner Tuilaepa intervened. He walked toward the scuffle, holding his rifle waist high,

and shot Melvin Whiddon in the neck at close range. The rifle bullet pierced Melvin Whiddon's lung and an artery.

Petitioner Tuilaepa swung the rifle in the direction of Kelvin Whiddon, Melvin Whiddon's brother. Kelvin Whiddon, unarmed, made no move toward Petitioner but instead tried to shield himself behind a post. Petitioner Tuilaepa, standing six feet away, shot Kelvin Whiddon in the chest.

Petitioner then turned the rifle toward a woman in the bar. Her husband, Bruce Monroe, stood in front of her to protect her. Monroe held no weapon, and made no threats or menacing gestures. Petitioner Tuilaepa shot Monroe in the stomach. The bullet tore through his kidney, his liver, and an artery of his heart, and it lodged against his spine.

Petitioner Tuilaepa and his accomplice ran toward the rear door of the bar. Kenneth Boone was standing near the door, but he made no move to stop petitioner. Petitioner made it to the door, looked back at Boone, smiled at him, and then aimed his rifle and shot Boone in the neck. The bullet exited the side of Boone's head, and Boone fell to the floor bleeding.

Kelvin Whiddon died from the gunshot wounds inflicted on him by Petitioner Tuilaepa. Melvin Whiddon was hospitalized for ten days due to his injuries, while Kenneth Boone was hospitalized for three

days. Bruce Monroe underwent surgery. At the time of trial, the upper part of his legs were numb and he wore a colostomy bag because of his gunshot wound.

Petitioner Tuilaepa was charged with murder and one special circumstance for the killing of Kelvin Whiddon. In addition he was charged with two firearm assaults, six robberies, and one attempted robbery for his attacks on the other patrons of the bar. In August 1987, Petitioner Tuilaepa was convicted of first degree murder with a finding that the special circumstance was true. The jury also convicted on the other charged offenses.

In the penalty-phase of the trial, the prosecution offered eyewitness testimony of several crimes and misdeeds that Petitioner Tuilaepa had committed during periods of confinement, primarily with the California Youth Authority (CYA), during 1982-1987. The purpose of this evidence was to show "[t]he presence . . . of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use force or violence," a factor for the jury's consideration in determining petitioner's sentence. Calif. Pen. Code, § 190.3(b). Prior to the presentation of this testimony to the penalty-phase jury, Petitioner Tuilaepa's counsel objected that some of the incidents, as described in advance by the eyewitnesses in a preliminary hearing outside the jury's presence, did not involve criminal

threats, force, or violence. The trial court overruled Petitioner's objection.

The various eyewitnesses then testified: (1) that Petitioner Tuilaepa in 1982 had attacked another ward in a fistfight and then threatened more retaliation against him; (2) that, later in 1982, he had yelled threats to rape and to kill a female guard as she patrolled the area outside of his locked cell; (3) that, in 1984, he had violated CYA rules by possessing razor blades, some of them broken, and a set of batteries taped together in the kind of pack typically used as a weapon; (4) that, after being cited by a CYA counselor for destroying a pair of state-issue pants in 1984, he had made a face-to-face threat to burn the counselor's face; (5) that, from inside his locked cell on successive days in 1985, he had yelled sexual threats and threats to torture or kill a woman guard in the hallway outside; (6) that, at a CYA infirmary in 1986, he had kicked a handcuffed ward in the face without any provocation; and (7) that, at the time of his murder trial in this case, he had struck and taken money from another inmate in the courthouse lockup room.

In defense at the penalty-phase, Petitioner Tuilaepa's mother and sister testified about difficulties in the Tuilaepa family, about petitioner's assistance to his paralyzed brother, and about their own desires for petitioner's life to be spared. In addition, a psychologist

testified that petitioner placed in the bottom five percent of the population in verbal ability, owing to the fact that he was raised by a family that communicated primarily in Samoan, but that he scored in the normal range, with normal intellectual potential, in non-verbal ability.

Each side was allowed one argument in the penalty phase. The prosecutor, who went first, expressly addressed arguments he said he anticipated from the defense about four kinds of mitigating evidence, Tuilaepa JA 10-11: Petitioner's age, Tuilaepa JA 11-14; Petitioner's sub-normal intelligence, Tuilaepa JA 10-11; the fact that victim Whiddon had precipitated the shooting by fighting with Petitioner's accomplice, Tuilaepa JA 15-16; and sympathy for Petitioner and his family, Tuilaepa JA 17-19. The prosecutor then offered his explanations why such mitigating evidence was not persuasive on the question of penalty. On the issue of age, the prosecutor argued that, in light of his criminal history, Petitioner had developed a level of criminal sophistication rendering him older than his years and that the methodical nature of the crime showed it was not a "mere folly of youth." Tuilaepa JA 12-13. "Age," the prosecutor said, "is not an excuse": Petitioner was "old enough to be held accountable" and was a "fit subject to face the death penalty." Tuilaepa JA 13-14. Similarly, the prosecutor argued that, because Petitioner

had no organic brain damage and possessed sufficient intelligence to function in life and to understand right and wrong, "the fact of an apparent subnormal IQ carries very little weight in this analytic process." Tuilaepa JA 14-15. In advance response to the possible suggestion that the victim had provoked the attack, the prosecutor argued that Petitioner could have responded in many ways short of homicide and that, rather than blame the victim, the proper focus of the jury should be the Petitioner's conduct. Tuilaepa JA 16-17. Last, on the question of mitigating evidence, the prosecutor argued that, regardless of sympathy for Petitioner's family, Petitioner's own crime rendered him undeserving of sympathy. Tuilaepa JA 17-19.

The prosecutor next discussed, explicitly, "the evidence that was presented in aggravation." Tuilaepa JA 19. He said it fell into two categories: the circumstances of the crime, and Petitioner's prior criminal behavior. Tuilaepa JA 19. The prosecutor argued that the circumstances of the crime themselves sufficed to justify the death penalty, and he specifically cited the number of people whom petitioner shot, the nature of their wounds, and the fact that the location of the wounds Petitioner inflicted even on the surviving victims had created a high risk of death that was avoided merely by good luck. Tuilaepa JA 25-26. On the issue of Petitioner's prior criminal behavior, the

prosecutor reminded the jury about Petitioner's assaults, the robbery, his possession of weapons, and his threats of violence. Tuilaepa JA 19-24.

Defense counsel discussed the five sentencing factors about which the jurors would be instructed, stating, "Believe me, you've just got an enormous amount of discretion." Tuilaepa JA 43-44. In discussing the "first" factor, the murder itself, defense counsel argued that it was "highly important" that Petitioner had not planned or premeditated or carefully considered killing anybody, but that Petitioner instead had fired all the shots within a few seconds after the unforseen conduct of victim Whiddon in attacking the accomplice. Tuilaepa JA 45-49. On the "next factor," the prior criminal conduct, defense counsel argued that Petitioner's conduct was "pretty insignificant." Tuilaepa JA 49-50. He then pointed out that, on the "third item," Petitioner had no prior felony convictions. Tuilaepa JA 51.

On the question of age, defense counsel pointed out that Petitioner was only about fifteen years old when he uttered some of his threats to the female counselors, and he contradicted the prosecutor's argument about Petitioner being "old enough" by asserting, "The law is age, period, not whether you're old enough, but age. [¶] He's a young man and you should consider that." Tuilaepa JA 52.

The trial court did not list all of the statutory sentencing factors from Penal Code section 190.3 in its instructions. Rather, the jury was instructed in part as follows:

> In determining which penalty is to be imposed on the defendant, you shall consider all the evidence that has been received during any part of the trial in this case. [¶] You shall consider, take into account and be guided by the following factors, if applicable: [¶] A, the circumstances of the crime in which the defendant was convicted in the present proceeding and the existence of any special circumstance found to be true. [¶] B, the presence or absence of criminal activity by the defendant which involved the use of force or violence or the express or implied threat to use force or violence. [¶] C, the presence or absence of any prior felony conviction. [¶] D, the age of the defendant at the time of the crime. [¶] E, any other circumstance which extenuates the gravity it *[sic]* of the crime even though it is not a legal excuse for the crime. [¶] And any other simpathetic *[sic]* or other aspect of the defendant's character or record that the defendant offers as a basis for a sentence less than death whether or not related to the offense for which he is on trial.

Tuilaepa JA 60-61.

The jury was also instructed as follows with respect to its consideration of Petitioner's prior misconduct in custody:

> Evidence has been introduced for for *[sic]* the purpose of showing that the defendant Tuilaepa has committed criminal acts which involve the express or implied use of force or violence or the threat of force or violence. [¶] Before you may consider any such criminal acts as an aggravating circumstance in this case, you must first be satisfied beyond a reasonable doubt that the defendant did in fact commit such criminal acts. [¶] You may not consider any evidence of any other criminal acts as an aggravating circumstance.

Tuilaepa JA 61-62.

The jury was instructed to consider, take into account, and be guided by the applicable aggravating and mitigating factors. They were further advised:

> In weighing of aggravating and mitigating circumstances does not mean *[sic]* a mere mechanical counting of factors on each side of an imaginary scale or the arbitrary assignment of weights to any of them. [¶] You are free to assign whatever moral or simpathetic *[sic]* value you deem appropriate to each and all of the

various factors you are permitted to consider. [¶] In weighing the various circumstances you simply determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. [¶] To return a judgment of death, each of you must be persuaded that the aggravating evidence is so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.

Tuilaepa JA 62-63.

Petitioner Tuilaepa did not object to any of the penalty phase jury instructions.

The jury commenced deliberations at 11:35 a.m. on August 12. At 3:20 p.m. the next day, August 13, the jury sent a note reporting a deadlock after "eight and a half hours of deliberation." The court excused the jurors for the day, asking them to return to continue deliberations the next morning at 9 a.m. At 10:40 the next morning, August 14, the jury returned its verdict of death for Petitioner Tuilaepa.

Petitioner Tuilaepa's appeal to the California Supreme Court was automatic. That court affirmed the convictions and death judgment in an opinion issued on December 28, 1992.

ARGUMENT SUMMARY

Petitioners essentially ask this Court to declare California's death penalty procedures unconstitutional, with the possible reversal and retrial of more than 350 death judgments. In these cases now before this Court, it is argued that three of the sentencing factors used in California to assist juries during the penalty phase of a capital case in selecting between death and life imprisonment without parole are subject to the vagueness test which this Court applied to the Mississippi capital sentencing scheme in *Stringer v. Black*, 503 U.S. ___; 112 S.Ct. 1130 (1992).

Petitioners allege that the following three capital sentencing factors are unconstitutionally vague when used for aggravation rather than mitigation: (1) the circumstances of the offense [Pen. Code § 190.3(a)]; (2) prior criminal activity which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence [Pen. Code § 190.3(b)]; and (3) the defendant's age [Pen. Code § 190.3(j)]. Petitioners claim that when used for aggravation rather than mitigation, these factors are so vague as to be of no benefit whatsoever in narrowing the jury's discretion and that these factors do not meaningfully assist the jury in making an individualized and rational sentencing choice. When used for

mitigation, Petitioners apparently see no vagueness in these same factors.

Falling victim to the "tyranny of labels" there is an assertion that since California refers to its capital sentencing factors as "aggravating circumstances" and because California requires penalty phase juries to "weigh" these sentencing factors, this state's sentencing procedures are identical to those of Mississippi and other weighing states. Respondent will show that such is not the case.

Although different from those in Mississippi and the other weighing states, California's capital sentencing procedures still meet the two basic constitutional requirements articulated by this Court for any capital sentencing scheme.

Thus, with respect to capital cases, this Court has consistently told the states that the Eighth Amendment imposes only two constitutional limitations on their capital sentencing procedures. First, rational criteria must be used to narrow the group of defendants eligible for the death penalty. Second, defendants facing capital sentencing must be allowed to present any relevant mitigating evidence.

Once these limitations have been met, the states have been given the option of fashioning their own individual procedures.

California has enacted statutory special circumstances which narrow the group of defendants eligible for the death penalty and California allows defendants to present their mitigating evidence at the penalty trial. Petitioners do not challenge the special circumstance findings utilized in California to narrow the group of defendants eligible for the death penalty. Instead, it is claimed that this Court's decision in *Stringer* holds that the Eight Amendment requires a second round of narrowing, which allegedly must take place at the sentencing phase.

In the Mississippi death penalty procedures which were reviewed in this Court's decision in *Stringer*, the aggravating circumstances used at the sentencing phase simultaneously performed two entirely different functions. The first of these two-fold functions is that of narrowing the class of death-eligible defendants and the second is that of assisting the sentencer in determining whether death is appropriate for the particular defendant.

To the extent that Mississippi's aggravating circumstances are used in this dual capacity, they were found to be subject to the Eighth Amendment's vagueness test.

The California Supreme Court has recently rejected the claim that the concerns expressed in *Stringer* are applicable to California's death penalty statute.

Simply put, a sentencing factor which does not perform a narrowing function, but is instead used exclusively to assist the jury in the selection of the appropriate penalty for a particular defendant, is not subject to this Court's traditional Eighth Amendment vagueness analysis. Under these circumstances, a second round of narrowing is not constitutionally mandated.

In its decision following remand from this Court, the majority opinion of the California Supreme Court found that while the traditional Eighth Amendment vagueness test did not apply to California, the sentencing factors set forth in Penal Code section 190.3 must nevertheless meet standards of specificity and relevance. The majority held in *People v. Bacigalupo*, 6 Cal.4th 457 (1993) (*Bacigalupo II*) that California's eleven capital sentencing factors "must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination."

It is respondent's position that even these standards are not constitutionally mandated where a state capital sentencing statute satisfies the traditional two part test of first narrowing the class of those who are death eligible and second, allows the defendant to present mitigating evidence on whether death is the appropriate punishment. *See Bacigalupo II, supra*, 6

Cal.4th at 479-484, 24 Cal.Rptr.2d at 822 (Panelli, J., concurring).

Petitioners are actually asking this court to drastically depart from its existing Eighth Amendment precedents. They are requesting that an entire new requirement be added to those already articulated in the cases summarized by *McClesky v. Kemp*, 481 U.S. 279 (1987). A holding by this Court that narrowing is needed not only at the capital eligible stage but also at the sentencing stage would "alter in significant fashion this Court's capital sentencing jurisprudence." *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2671 (1993). Such an expansion of the Eighth Amendment would work a substantial injustice on those states which have justifiably relied on this Court's previous pronouncements as to the minimum requirements of the Eighth Amendment.

However, even if this Court were to review the three challenged sentencing factors for vagueness as Petitioners suggest, there is no basis for finding any of them constitutionally suspect since they each meet the dual requirements of relevance and specificity called for by the California Supreme Court. Nor have Petitioners shown that the Eighth Amendment requires that the factors set forth in Penal Code section 190.3 be individually labelled as either aggravating or mitigating.

For these reasons, Respondent asks this Court to deny Petitioners' request for relief.

ARGUMENT

I.

THE SENTENCING FACTORS USED IN CALIFORNIA TO ASSIST JURIES DURING THE PENALTY PHASE IN SELECTING THE APPROPRIATE PUNISHMENT IN A CAPITAL CASE ARE NOT SUBJECT TO THIS COURT'S EIGHTH AMENDMENT VAGUENESS ANALYSIS

Petitioners jointly argue that the vagueness test employed in *Stringer* and in this Court's earlier Eighth Amendment cases must be applied to at least three of the eleven sentencing factors[1/] used in California by

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1. Penal Code section 190.3 specifies that the factors which the jury shall take into account in selecting the appropriate penalty in a capital case are:

(a) The circumstances of the crime. . . .

(b) The presence or absence of criminal activity . . . which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

(c) The presence or absence of any prior felony conviction.

(d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(e) Whether or not the victim was a participant. . . .

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a morel justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired

juries deciding the appropriate penalty in capital cases. Respondent disagrees as did the California Supreme Court when it recently considered and rejected the identical claim. *See People v. Bacigalupo*, 6 Cal.4th 457 (1993).

Specifically, Petitioners allege that the following three factors which juries may consider in deciding the appropriate punishment in a capital case are unconstitutionally vague when used as an aggravating rather than mitigating circumstance: (1) the circumstances of the offense [Pen. Code § 190.3(a)]; (2) prior criminal activity which involved the use or attempted use of force or violence or the expressed or implied threat to use force or violence [Pen. Code § 190.3(b)]; and (3) the Defendant's age [Pen. Code § 190.3(i)]. Petitioners claim that when used as an aggravating rather than mitigating circumstance, these factors are so vague as to be of no benefit whatsoever in narrowing the jury's discretion and that these factors do not assist the jury in making an individualized and rational sentencing choice. Petitioners claim this

as a result of mental disease or defect, or the effects of intoxication.

(i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime.

vagueness is so pernicious that it also prevents meaningful review by the trial court at the modification hearing and that it also prevents meaningful appellate review by the California Supreme Court. In short, Petitioners claim that any capital judgment in which aggravating evidence was used pursuant to any of these factors must automatically be reversed. However, Petitioners apparently find no constitutional vagueness problems when this same type evidence is used as a mitigating circumstance.

Petitioner Proctor challenges only factor (a) while Petitioner Tuilaepa challenges all three factors. In the case of Petitioner Proctor, the prosecutor acknowledged that age could be considered by the jury as a mitigating circumstance in selecting the appropriate punishment and no factor (b) evidence was introduced at the penalty phase retrial in petitioner Proctor's case.

In Petitioner Tuilaepa's case, the prosecutor merely argued against considering the defendant's age as a mitigating factor and did not affirmatively claim that age was an aggravating factor. The prosecutor in the Tuilaepa case did argue that there was evidence which established that both factors (a) and (b) were aggravating rather than mitigating circumstances.

Citing to this Court's opinion in *Stringer v. Black*, 503 U.S. ___, 117 L.Ed.2d 367 (1992), Petitioners claim these three sentencing factors, when used to show

aggravation, are deficient in that (1) the term "circumstances of the crime" under factor (a) is allegedly vague in regard to which facts of the case weigh in favor of death and that this factor provides no guidance to the jury in making its sentencing choice; (2) factor (b) is allegedly vague because the jury is not told which crimes qualify as aggravators and what the elements of these crimes are; and (3) factor (i) is supposedly vague because the jury is provided no guidance on how to determine how a defendant's chronological age mitigates or aggravates the charged offenses. In addition, Petitioner Proctor argues that factors (d), (e), and (f) are also vague because the prosecutor was allowed to argue that the absence of mitigating evidence permitted the jury to consider these as aggravating factors. Finally, Petitioner Proctor argues that factors (d), (e), (f), (g), (h), and (j) are vague because the jury is not told whether they are aggravating or mitigating, if present.

As will be shown, Petitioners' attempt to establish the vagueness of these sentencing factors under *Stringer v. Black* is misplaced, as the California capital punishment scheme fully comports with this Court's well-established death penalty jurisprudence.

The constitutional requirements which a state must satisfy before imposing a death sentence were

succinctly summarized by this Court in *McCleskey v. Kemp*, 481 U.S. 279, 305-306 (1987):

> In sum, our decisions since *Furman* [v. *Georgia* (1972) 408 U.S. 238] have identified a constitutionally permissible range of discretion in imposing the death penalty. First, there is a required threshold below which the death penalty rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold. Moreover, a societal consensus that the death penalty is disproportionate to a particular offense prevents a State from imposing the death penalty for that offense. Second, States cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the penalty. In this respect, the State cannot channel the sentencer's discretion, but must allow it to consider any relevant information offered by the defendant.

Once these two constitutionally imposed limiting principles have been satisfied, "the States enjoy their traditional latitude to prescribe the method by which those who commit murder shall be punished." *Blystone v. Pennsylvania*, 494 U.S. 299, 309 (1990).

While the Eighth Amendment clearly requires that the class of death-eligible defendants be narrowed,

this Court has consistently held that it is also the rule that there is no exclusive "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida*, 468 U.S. 447, 464 (1984). Thus, this Court has found that the narrowing function may take place at either the guilt of penalty phase of a capital case. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245 (1988). In many states the jury's discretion is channeled through the use of aggravating circumstances (referred to as special circumstances in California), one or more of which must be found true before a defendant is eligible for the death penalty. The use of such aggravating or special circumstances is not, however, "an end in itself" (*Lowenfield, supra,* at p. 244), and "the Eighth Amendment does not require that these aggravating circumstances be further refined or weighed by a jury." *Blystone, supra,* at p. 298.

For those states which employ them as part of the constitutionally required narrowing function, aggravating circumstances must "furnish principled guidance for the choice between death and a lesser penalty. *Richmond v. Lewis*, 506 U.S. ___, 121 L.Ed.2d 411; 113 S.Ct. 528, 534 (1992). That is, the circumstance must "genuinely narrow the class of persons" eligible for death and must "reasonably justify" the death penalty" on the defendant as compared to other convicted murderers. *Zant v. Stephens*, 462 U.S.

862, 877 (1993). An aggravating circumstance which a "person of ordinary sensibility" could find applicable to any murder will not suffice. *Godfrey v. Georgia*, 446 U.S. 420, 428-429 (1980) [absent some judicial limitation, an outrageously or wantonly vile, horrible, and inhuman aggravating factor did not adequately limit the jury's discretion].)

Claims that a particular aggravating or special circumstance is vague "are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in *Furman [,supra]*." *Maynard v. Cartwright*, 486 U.S. 356, 361-362 (1988). This court in *Maynard* expressly distinguished its review of statutory narrowing factors from claims of vagueness based on lack of notice under the Due Process Clause. In the latter case, statutes are assessed on an "as-applied basis" and the due process challenge may be overcome where "reasonable persons would know that their conduct is at risk." *Id.*, at p. 361. Thus, one who challenges an aggravating or special circumstance on Eighth Amendment grounds does not so much allege that the average juror would fail to understand the terms used, as they complain that any understanding based on the generally accepted meaning

of those terms would provide no guidance in channeling the jury's discretion *during the critical narrowing process.*

This Court's well established Eighth Amendment jurisprudence also amply demonstrates that the primary constitutional concern is with the procedure by which the state imposes a death sentence rather than with the substantive factors considered by the sentencer once the defendant is found to be within the class of persons eligible for the death penalty. *California v. Ramos*, 463 U.S. 992, 999 (1983). After the jury's discretion has been adequately channeled by narrowing the class of death-eligible defendants, this Court has allowed the states to permit juries to consider "a myriad of factors to determine whether death is the appropriate punishment." *Id.*, at p. 1008. The jury may, at that point, "exercise unbridled discretion" in reaching its sentencing verdict. *Zant v. Stephens*, *supra*, 462 U.S. at p. 875.

With the above principles in mind, *Stringer* and its application, if any, to California's death penalty law will be examined.

In *Stringer*, this Court reviewed a Mississippi death judgment. As explained in the opinion, a Mississippi defendant who is convicted of a capital murder -- in that case a killing during a robbery or

burglary -- proceeds to a sentencing phase.[2] If the jury returns a finding at the sentencing phase that at least one of eight statutory aggravating circumstances is true, it must then determine whether there are any mitigating circumstances which outweigh the aggravation before it may impose a death sentence. 112 S.Ct. at p. 1134. Thus, as interpreted by the Mississippi Supreme Court, *see Stringer, supra* at 1138-1139, an aggravating factor in Mississippi simultaneous performs two entirely different functions. The first of these two distinct functions is that of narrowing the class of death-eligible defendants and the second is that of assisting the sentencer in determining whether death is appropriate for the particular defendant. Indeed, the jury's finding of an aggravating circumstance effectively requires the defendant to present evidence of mitigation sufficient to overcome the aggravation. *Cf. Walton v. Arizona*, 497 U.S. 639, 643-644 (1990); 110 S.Ct. 3047 [placing burden on defendant to present mitigation sufficient to overcome aggravation does not violate the Constitution].)

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2. Under Mississippi law a finding of "capital murder" is not designed to channel juror discretion, but is a necessary prerequisite to a sentencing hearing in the same way that a California jury must find first degree murder before the defendant is death-eligible. See Miss. Code, Ann. §§ 97-3-19; 97-3-21; see also *Cabana v. Bullock*, 474 U.S. 376, 385 (1986) [discussing "capital murder" under Mississippi law].

Stringer's jury found three aggravating circumstances. Although the Mississippi Supreme Court upheld all of them in affirming the judgment, subsequent United States Supreme Court decisions (see *Clemons v. Mississippi*, 494 U.S. 738 (1990) concluded that the "heinous, atrocious or cruel" circumstance was unconstitutionally vague. Given the significance the Mississippi court has attached to aggravating circumstances during the weighing phase of a capital sentencing hearing, this Court found that the use of "a vague or imprecise" factor "at the very least requires constitutional harmless-error analysis or reweighing in the state judicial system." 112 S.Ct. at p. 1140. The reviewing court in a "weighing state"[3/] may not simply assume that an invalid aggravating factor did not infect the weighing process. *Id.*, at p. 1137. Such analysis is particularly important under a statute like Mississippi's where the invalid aggravating factor first narrows the class and then effectively creates a presumption of death

3. While it is true that California requires juries to weigh aggravating and mitigating factors during the penalty phase, it is not clear that this process makes California a weighing state within the meaning of the this Court's Eighth Amendment cases. In *Stringer* the court focused on the fact that the sentencing authority must first find an aggravating circumstance, which narrows the death-eligible class, and then weigh against that finding any mitigation. See also *Richmond v. Lewis*, *supra*, 121 L.Ed.2d 411; 113 S.Ct. at p. 534 [characterizing Arizona as a weighing state]. This is entirely unlike California's procedure, as explained further below.

unless outweighed by any mitigating evidence. *Id.*, at p. 1139. This Court also observed in *Stringer* that "a vague aggravating factor used in the weighing process . . . creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." *Ibid.* When considered in its proper context, respondent submits that the concern expressed in *Stringer* has no applicability to California's death penalty statute. Simply put, a sentencing factor which does not perform a narrowing function, but is used exclusively to assist the jury in the selection of the appropriate penalty for a particular defendant, is not subject to this Court's traditional Eighth Amendment vagueness analysis.

This was the precise holding of the California Supreme Court when it recently decided *People v. Bacigalupo*, 6 Cal.4th 457 (1993), on remand from this Court's order in *Bacigalupo v. California*, 506 U.S. ___, 121 L.Ed.2d 5; 113 S.Ct. 32 (1992).

In *Bacigalupo II* the California Supreme Court interpreted its own state law as falling outside this Court's Eighth Amendment concerns expressed in *Stringer*. This Court has noted that a state Supreme Court's interpretation of the meaning of its state's death penalty law can alone be dispositive. *Stringer*, 117 L.Ed.2d at 381. The California Supreme Court has

concluded that this Court's Eighth Amendment vagueness concerns expressed in *Stringer* have no application to the sentencing factors set forth in California Penal Code section 190.3 since these factors are only considered by the sentencer after the defendant has been found beyond a reasonable doubt to have come within the legislatively defined category of persons eligible for the death penalty. *Bacigalupo II*, 6 Cal.4th at 474-478 (majority opinion), at 480 (concurring opinion of Justice Panelli) 24 Cal.Rptr.2 at 818-820; at 822.

Neither Petitioner attacks the "vagueness" of the special circumstances which made them eligible for the death penalty in California. Instead, they merely seek to apply the vagueness test to the sentencing factors of California Penal Code section 190.3 which assist the jury in determining who among those eligible for capital punishment should actually be put to death.

In *Stringer*, Mississippi sought to establish that its system could be equated with the scheme in Louisiana which had survived constitutional challenge in 1988. In Louisiana, however, the narrowing of the death-eligible class occurs with the finding of capital murder in the guilt phase, after which the jury must find at least one aggravating circumstance, but is not required to weigh aggravating versus mitigating factors in order to return a verdict of death. This Court upheld the Louisiana scheme, finding its use of aggravating circumstances was

not comparable to their use in other states, such as Florida, i.e., so called "weighing" states. *Lowenfield v. Phelps*, 484 U.S. 231, 244-245, 98 L.Ed.2d 568, 108 S.Ct. 546 (1988); compare *Socher v. Florida*, 504 U.S. ___, 119 L.Ed.2d 326; 112 S.Ct. 2114 (1992) and *Espinosa v. Florida*, 505 U.S. ___, 120 L.Ed.2d 854; 112 S.Ct. 2926 (1992).

It was argued by the state in *Stringer* that since Mississippi narrowed the death-eligible class in the guilt phase by requesting the jury to first convict the defendant of capital murder, the use of aggravating factors in Mississippi had no constitutional significance. The Mississippi Supreme Court had, however, stated in no uncertain terms that its "sentencing scheme operates in the same manner as the Florida system." *Stringer*, 117 L.Ed.2d at 381. The Mississippi statute was also interpreted by the United States Supreme Court in light of *Godfrey v. Georgia*, 446 U.S. 420, 64 L.Ed.2d 398, 100 S.Ct. 1759 (1980) and *Maynard v. Cartwright*, 486 U.S. 356, 361-362; 100 L.Ed.2d 372; 108 S.Ct. 1853 (1988), which dealt with the adequacy of state aggravating circumstances to channel the sentencer's discretion by narrowing the death-eligible class. *See also Shell v. Mississippi*, 498 U.S. ___, 112 L.Ed.2d 1; 111 S.Ct. 313 (1990) reversing because of inadequate aggravating factors, citing *Maynard* and *Godfrey*.

In contrast to the situation presented in *Stringer*, neither this Court, nor the California Supreme Court has held that the sentence selection part of California's death penalty scheme operates in precisely the same manner as another state wherein aggravating factors have been held to have constitutional significance.[4]

4. Petitioners and amicus curiae suggest that this Court's denial of certiorari in *Pensinger v. California*, ___ U.S. ___ 116 L.Ed.290; 112 S.Ct. 357 (1991) reh. den. 112 S.Ct.923 indicates that at least two justices of this Court have found that California and Mississippi are both weighing states. Petitioners' reliance on *Pensinger* is misplaced. In *Pensinger* the defendant had been convicted of two special circumstances, one of which was later found to be invalid. Justice O'Connor noted that in California at the penalty phase, the trier of fact weighs any aggravating circumstances, including the special circumstances found to be true, against any mitigating circumstances. The California Supreme Court had found the torture murder special circumstance to be invalid because of an instructional error dealing with the requisite intent. *See People v. Pensinger*, 52 Cal.3d 1210; 278 Cal.Rptr. 640 (1991). The California Supreme Court had rejected a harmless error claim as to the validity of this special circumstance but nevertheless affirmed the conviction, because there was still one other valid special circumstance in the case.

As the dissent from the denial or certiorari notes in *Pensinger* the penalty phase jury in California may consider "any special circumstances found to be true" as an aggravating factor under Penal Code section 190.3(a). The California Supreme Court emphasized, however, that it was the *facts* relating to torture, rather than the statutory label of "special circumstance," which was of significance to the jury in its penalty deliberations. 52 Cal.3d at 1271-1272, 278 Cal.Rptr. at 674. This is completely unlike the Mississippi statutory scheme where the aggravating factor itself is significant to the penalty determination. For these reasons Petitioners are mistaken in their attempt to rely on the denial of certiorari in *Pensinger v. California, supra,* to support this claim that California and Mississippi are, or have been held

Most recently, in *Bacigalupo II*, the California Supreme Court explained that the factors set forth in section 190.3 are only considered by the sentencer after the defendant has been found death eligible under other provisions of the California Penal Code which are not being constitutionally attacked. *Bacigalupo II*, 6 Cal.4th at 475-477, 24 Cal.Rptr.2 at 819-820.

In *Bacigalupo II*, the California Supreme Court did not stop at holding that *Stringer* does not apply to California's sentencing factors but instead went on to find that the Eighth Amendment nevertheless imposes a lesser standard on factors used exclusively to assist the jury in a capital case to decide upon the appropriate punishment. In this regard the California Supreme Court held that:

> Any meaningful assessment of the moral culpability of a defendant convicted of the crime of capital murder will invariably include some facts about the offense and the offender that will weigh in the sentencing decision in favor of the more severe penalty of death. The section 190.3 "aggravating" factors in California's capital scheme do no more than direct attention to such facts. Because they do not perform a "narrowing" function, they are not subject to the standard that

to be, "weighing" states for *Stringer* purposes.

the United States Supreme Court articulated in *Godfrey v. Georgia, supra*, 446 U.S. 420, and in *Maynard v. Cartwright, supra*, 486 U.S. 356.

We do not, however, suggest that the Eighth Amendment imposes no standards whatsoever on those sentencing factors in section 190.3 of our 1978 death penalty law that can serve to aggravate penalty. As we explained in *People v. Tuilaepa, supra*, 4 Cal.4th at p. 595, these factors must meet the dual standards of "specificity" and of "relevance." *They must be defined in terms sufficiently clear and specific that jurors can understand their meaning, and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination.*[5/]

6 Cal.4th at 477, 24 Cal.Rptr.2d at 820 (emphasis added).

Contrary to Petitioners' assertion, the California Supreme Court's decision in *Bacigalupo II* is entirely

5. Respondent does not endorse the portion of the majority opinion of the California Supreme Court which holds that the so-called "dual standards" test is required by the Eighth Amendment. Instead, Respondent agrees with the concurring opinion by Justice Panelli which finds that such a standard is not constitutionally mandated where a state capital sentencing statute satisfies the traditional two part test of first narrowing the class of those who are death eligible and second, allows the defendant to present mitigating evidence on whether death is the appropriate punishment. *See Bacigalupo II, supra*, 6 Cal.4th at 479-484, 24 Cal.Rptr.2d at 821-825 (Panelli, J., concurring).

consistent with the previous decisions of that court and offered no new or shocking interpretation of California's death penalty statutes. In contrast to the capital sentencing schemes in other states, before a California defendant is eligible for death, there must be a conviction of first degree murder *and* at least one special circumstance must be found true beyond a reasonable doubt. Pen. Code, § 190.1. "A single valid special circumstance finding is sufficient to determine that defendant is eligible for the death penalty." *People v. Bittaker*, 48 Cal.3d 1046, 1102; 259 Cal.Rptr. 630, 662 (1989). This provision adequately "limits the death sentence to a small subclass of capital-eligible cases." *Pulley v. Harris*, 465 U.S. 37, 53 (1984).

At the penalty phase the jury takes into account any of eleven statutory factors, if relevant, as well as any non-statutory mitigating evidence presented by the defendant. Pen. Code, § 190.3. If the jury concludes that the aggravating factors outweigh the mitigating factors, it returns a sentence of death. If it finds that mitigation outweighs aggravation, it returns a sentence of life in prison without parole. Pen. Code, § 190.3. There is no presumption that death is appropriate at the sentencing phase in California, *People v. Andrews*, 49 Cal.3d 200, 230; 260 Cal.Rptr. 583, 603 (1989), and apart from the requirement that the state prove prior uncharged criminal activity beyond a reasonable doubt,

People v. Robertson, 33 Cal.3d 21, 53; 188 Cal.Rptr. 77, 96 (1982), neither side has any burden of proof with respect to aggravation,[6] mitigation, or the appropriateness of death. *People v. Frierson*, 25 Cal.3d 142, 180, 158 Cal.Rptr. 281, 303 (1979).

Unlike Mississippi's aggravating circumstances which alone authorize death unless a jury finds that any mitigation outweighs them, a special circumstance finding in California in and of itself creates no presumption that death is appropriate.[7] To be sure, under California's statute the sentencing jury must consider the circumstances of the present crime and any special circumstances found to be true under section 190.3, subdivision (a), but California special

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6. Although not required to do so, the trial judge in Petitioner Proctor's case allowed the jury to impose a greater burden on the prosecution by instructing the jury that before it could consider "any fact as an aggravating circumstance" it had to "find that that fact has been established by evidence beyond a reasonable doubt." Proctor JA 79. The jury was also specifically instructed that the reasonable doubt standard applied to the three special circumstance findings and that the penalty phase jury had to make a *de novo* finding of the truth of each special circumstance before "you may determine whether or not the crimes and circumstances thereof constitute an aggravating factor."

7. California's special circumstances are, of course, subject to Eighth Amendment vagueness analysis. *See, e.g., People v. Davenport*, 41 Cal.3d 247, 260-271, 221 Cal.Rptr. 794, 801-810 (1985) (torture special circumstance); *People v. Edelbacher*, 47 Cal.3d 983, 1025; 254 Cal.Rptr. 586, 611-612 (1989) (financial gain special circumstance).

circumstances do not supply the sole basis for (or even a presumption in favor of) justifying a death sentence. By contrast, the Mississippi aggravating circumstances, which narrow the jury's discretion for *Furman* purposes (*Furman v. Georgia*, 408 U.S. 238 (1972), are also the *only* aggravating factors the jury may consider in determining whether death is appropriate. *See* Miss. Code Ann., § 99-19-101(5).

In this regard, the California Supreme Court has held that it is the *facts* underlying the special circumstances, as opposed to the finding that they are true, which is of particular significance to the penalty jury under the California sentencing scheme. *See, e.g., People v. Silva*, 45 Cal.3d 604, 632-636; 247 Cal.Rptr. 573; 588-590 (1988) (jury not misled by consideration of three improper special circumstances). Thus, because they are but one part of the factors upon which a jury may base its death verdict, special circumstances have a substantially different role and perform a far different function under California's statutory scheme from those of Mississippi's aggravating circumstances which were at issue in *Stringer*.

Petitioners and their amicus, the California Appellate Project [CAP], fall victim to the "tyranny of labels," *Snyder v. Massachusetts*, 291 U.S. 97, 114 (1934), by assuming that because California refers to its capital sentencing criteria as "aggravating factors," they must be

the same as "aggravating circumstances" in other states. Similarly, they conclude that because California requires the jury to "weigh" the aggravating and mitigating factors, it must invoke the same process applicable in other states which describe their sentencing procedure in similar terms. As this Court has observed, there is no "right way for a State to set up its capital sentencing scheme." *Spaziano v. Florida, supra*, at 464. It is thus necessary to examine each statute in its own context to determine the role and constitutional implications of its various sentencing procedures.

The determination that death is the appropriate punishment "is a moral inquiry into the culpability of the defendants." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring). It is simply not possible to translate the concerns relating to an unwarranted conviction or an inadequate narrowing of the death-eligible class into the process by which the jury determines the appropriate punishment for a death-eligible defendant. *See California v. Ramos*, *supra*, 463 U.S. at 1009. By focusing attention on aggravation that includes matters "not directly related to the crime," *Boyde v. California*, 494 U.S. 370, 378 (1990) (referring to § 190.3(b)), and identifying various mitigating considerations, the list of relevant sentencing factors set forth in California Penal Code section 190.3 provides guidance to the jury and lessens the chance of an

arbitrary application of the death penalty. *Pulley v. Harris, supra,* 465 U.S. at 53. Nothing more has previously been required by the Constitution.

Petitioners are actually asking this Court to drastically depart from its existing Eighth Amendment precedents. They are requesting that an entire new requirement be added to those already articulated in the cases summarized by *McClesky v. Kemp*. A holding by this Court that narrowing is needed not only at the capital eligible stage but also at the sentencing stage would "alter in significant fashion this Court's capital sentencing jurisprudence." *Johnson v. Texas*, ___ U.S. ___, 113 S.Ct. 2658, 2671 (1993). Such an expansion of the Eighth Amendment would not bode well for those states which have justifiably relied on this Court's previous pronouncements as to the minimum requirements of the Eighth Amendment.

Acknowledging the unique nature of capital punishment, and to minimize the risk of arbitrary or capricious decisions, Respondent does not contest the necessity mandated by this Court for a narrowing of the class of those who are eligible for the death penalty. The two cases presently before the Court raise the issue of whether the Eighth Amendment requires yet another level of narrowing.

The objective of the sentencing hearing in a capital case "is an individualized determination on the

basis of the character of the individual and the circumstances of the crime." *Zant v. Stephens, supra*, 462 U.S. at 879. It would seem that the jury is in the best position to meet this objective if it is allowed to receive and consider all of the relevant evidence available on this question, not just the unrestricted mitigating evidence offered by the defendant. One of the time honored principles of our judicial system holds that the adversarial system provides the best opportunity for insuring that a jury receives all of the relevant evidence pertaining to a contested factual question.

In its amicus brief CAP sets forth numerous examples of the different ways in which California's statutory sentencing factors have been argued. This, according to amicus, demonstrates that the provisions of Penal Code section 190.3 are vague. Apart from this Court's refusal to base constitutional interpretation on a comparative analysis of state court cases, *see Arave v. Creech*, 507 U.S. ___, 113 S.Ct. 1534, 1543-1544 (1993), or the arguments presented by prosecutors in other cases, *see Boyde v. California, supra,* 494 U.S. at 386 n. 6, the examples set forth by CAP support Respondent's rather than Petitioners' argument. That the various factors in section 190.3 can be interpreted in a variety of ways simply demonstrates their use as sentencing considerations to be applied in light of the specific defendant and circumstances of each capital case. Far

from injecting randomness into the process the general criteria assure that the jury will focus on the evidence for and against death which will most accurately assist the jury in its determination of the appropriate penalty for *that case*.

It is clear that the Eighth Amendment concerns articulated by this Court in *Stringer* with respect to aggravating factors which both narrow and determine, if not presume, death are *not* present anywhere in the California scheme. This Court's concern regarding the state's use of a vague aggravating factor in the weighing process, 112 S.Ct. at 1139, simply emphasizes the point that where a jury's discretion has not been fully narrowed during the course of the trial because of an inadequate aggravating factor, the mandate of *Furman* is not satisfied by weighing any mitigation against the questionable aggravating factor during the penalty phase.

Further, any claim that the sentencing factors listed in Penal Code section 190.3 are subject to independent vagueness analysis was impliedly rejected in *Zant v. Stephens, supra*. In *Zant*, the Georgia Supreme Court held that "a substantial history of serious assaultive criminal convictions" (one of the three aggravating factors used to narrow the death-eligible class in Stephens' case) was unconstitutionally vague. That is, it did not provide an adequate basis for distinguishing those murderers for whom death, in

general, would be appropriate, from those for whom it would not.[8/] This Court later found, however, that the same evidence of prior criminal conduct was constitutionally admissible at the sentencing phase as a basis for imposing the death sentence, regardless of the labels attached by the jury to that conduct. 462 U.S. at pp. 887-891. Indeed, the Constitution does not prohibit consideration of the defendant's criminal record, even as non-statutory aggravation, *Barclay v. Florida*, 463 U.S. 939, 956 (1983), because it is the type of information specific to the individual defendant which will assist the jury in determining whether death is appropriate for that particular member of the narrowed class. Thus, *Zant* clearly stands for the proposition that a factor which may be defective for purposes of narrowing the class of death-eligible defendants may nevertheless be constitutionally considered by a jury at the penalty phase in deciding whether to impose death on a defendant otherwise determined to be eligible for that penalty.

In light of this Court's holding in *Zant*, California's sentencing factors in section 190.3 are not subject to an Eighth Amendment vagueness analysis. California's special circumstances adequately narrow the death-eligible class, while the statutory sentencing factors

8. That court also upheld Stephens' death penalty because the other two ruled aggravating factors adequately supported the sentence. 462 U.S. at 867-868.

merely provide guidance to the jury regarding the type of information it should consider in determining the appropriate penalty. To the extent that a vagueness challenge can be mounted, it is limited to due process concerns about lack of notice and must be considered in light of each specific case. *Maynard v. Cartwright, supra*, 486 U.S. at 361.

Moreover, this Court's prior decisions which have consistently accepted the validity of California's death penalty statutes cannot be easily ignored. For example, in *California v. Ramos*, *supra*, 463 U.S. 992, this Court observed that a special circumstance finding by the jury placed the defendant into a class of persons eligible for the death penalty. *Id.*, at 1008. Rejecting a claim that an instruction dealing with the governor's commutation power was improper, this Court then found that section 190.3 "ensures that the jury will have before it information regarding the individual characteristics of the defendant and his offense, including the nature and circumstances of the crime and the defendant's character, background, history, mental condition, and physical condition." *Id.*, at 1006.

This Court again examined California's death penalty laws in *Pulley v. Harris*, *supra*, 465 U.S. 37. After summarizing the 1977 statute -- which for purposes of this argument is identical to the 1978 scheme under which Petitioners were prosecuted -- the

court concluded that California's procedure "cannot be successfully challenged under *Furman*, and our subsequent cases." *Id.*, at 51-53. The Court noted that the special circumstances adequately limited the subclass of death-eligible defendants, while the provisions of section 190.3 guided the jury's discretion in its deliberations. *Id.*, at 53.[9]

In *California v. Brown*, *supra*, 479 U.S. 538, 540, fn *, this Court expressly noted its "approval of [California's] statutory scheme" in *Ramos* and *Harris*. Given California's justifiable reliance on those decisions, and the failure to demonstrate that they "were themselves a misinterpretation of some constitutional command," Petitioners' effort to effectively eviscerate this Court's prior approval of the state death penalty scheme should be rejected. *Johnson v. Texas*, *supra*, 113 S.Ct. at 2668.

In none of the cases did this Court suggest that it viewed California as a "weighing state." Yet it was that description of the Mississippi process which compelled the reversal in *Stringer*. 112 S.Ct. at 1137; *see also Clemons v. Mississippi*, *supra*, 494 U.S. at 745 (describing Mississippi as a weighing state.) This Court

9. Although California provides such guidance to the jury, it is under no constitutional duty to do so. *Zant v. Stephens*, *supra*, 462 U.S. at 875; *California v. Ramos*, *supra*, 463 U.S. at 1008 n. 22.

has described a "weighing state" as one in which the "death penalty may be imposed only where specified aggravating circumstances outweigh all mitigating circumstances." *Parker v. Dugger*, 498 U.S. 308 (1991). When the operation of section 190.3 as set forth above is contrasted with the procedures followed in the so-called weighing states previously identified by this Court, it is clear that California does not fit neatly into that category and that California's use of its sentencing factors differs markedly from any other state.

Although a Florida jury returns an advisory verdict, the "trial judge . . . has ultimate sentencing authority. . . ." *Parker v. Dugger*, *supra*, 498 U.S. at 310. The Florida judge must find in writing at least one statutory aggravating circumstance, then conclude that there are insufficient mitigating circumstances to outweigh the aggravation. Fla. Stat., § 921.141(3). This procedure qualifies Florida as a weighing state. *Id.*, at 738; *Socher v. Florida*, ___ U.S. ___, 112 S.Ct. 2114, 2119 (1992).

Arizona provides exclusively for judicial sentencing in capital cases. In order to impose death, the trial court must find in writing that one or more of the statutory aggravating factors is true and that there are no mitigating factors sufficiently substantial to call for leniency. The state bears the burden of proving aggravation, while the defendant has the burden with

respect to mitigation. Ariz. Rev. Stat. Ann., § 13-703; *Walton v. Arizona*, *supra*, 497 U.S. at 643-644. Arizona is a weighing state. *Richmond v. Lewis*, *supra*, ___ U.S. ___, 113 S.Ct. at 534.

Unlike each of the above statutory schemes, California allows the jury at the penalty phase to determine whether the evidence before it has shown a particular sentencing factor to be either mitigating or aggravating. The penalty phase jury is not asked to decide if a particular aggravating factor is present. Moreover, California does not require written findings by the sentencer, does not require an express finding or agreement on the aggravating or mitigating factors, and does not provide a specific standard for weighing the aggravating and mitigating factors. Rather than mandating a specific finding that at least one aggravating circumstance exists in order to justify a death sentence, California provides a list of potential sentencing considerations which assists the jury in making "its appropriateness determination during its normative weighing" of the evidence dealing with these factors. Several of these factors can only be mitigating and others including factors (a), (b), and (c) can be either aggravating or mitigating depending upon the nature and quality of the evidence. *People v. Boyde*, 46 Cal.3d 212, 254; 250 Cal.Rptr. 83, 107 (1986), affd.; *sub nom. Boyde v. California*, 494 U.S. 370 (1990).

Thus, while a California penalty phase jury "weighs" evidence indicating aggravation against evidence offered to show mitigation, its deliberative process is not confined and directed in the manner followed by "weighing" states. Not only is the limited direction provided by California's unique statutory scheme constitutional, *see, e.g.*, *Zant v. Stephens*, *supra*, 462 U.S. at 875; *California v. Ramos*, *supra*, 463 U.S. at 1008 n. 22, it precludes application of the *Stringer* vagueness analysis to the factors in section 190.3.

In their haste to argue that California's death penalty laws are similar to those of Mississippi, Petitioners bypass the significant differences which distinguish the two statutory schemes. Petitioners rely primarily upon labels and overlook the basic functional differences between the Mississippi capital punishment laws and those of California. Because the two states differ significantly in the ways that their respective death penalty statutes operate, application of the Eighth Amendment vagueness test articulated by this Court in its *Stringer* decision to California is neither factually nor constitutionally appropriate.

II.

THE THREE SPECIFIC SENTENCING FACTORS CHALLENGED BY PETITIONERS ARE NOT FACIALLY VAGUE NOR DOES THE CONSTITUTION REQUIRE THAT THEY BE CHARACTERIZED AS EITHER AGGRAVATING OR MITIGATING

Even if this Court were to review the three challenged sentencing factors for vagueness as Petitioners suggest, there is no basis for finding any of them constitutionally suspect. In *Bacigalupo II*, the California Supreme Court found under a newly created Eighth Amendment standard, that capital sentencing factors must be defined in terms sufficiently clear and specific that ordinary jurors can understand their meaning and they must direct the sentencer to evidence relevant to and appropriate for the penalty determination. 6 Cal.4th at 477; 24 Cal.Rptr.2d at 820. Whether tested under the *Bacigalupo II* standard or by traditional Fourteenth Amendment vagueness analysis, there is no basis for challenging any of the sentencing factors in section 190.3 Nor does the Eighth Amendment require that any of California's eleven sentencing factors be individually labelled as aggravating or mitigating factors.

A. "Circumstances Of The Crime" Has Already Been Held To Be A Proper Factor To Be Considered In Determining Penalty and Is Defined In Terms Which Are Both Clear And Specific

Obviously the circumstances of the crime, in and of themselves, will not satisfy the Eighth Amendment requirement of narrowing the class of death-eligible defendants. However, by the time a California jury considers evidence related to factor (a) in the penalty trial, it has already narrowed the death eligible class through a special circumstance finding and it is then "free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, *supra*, 463 U.S. at 1008. "The primary concern in the Eighth Amendment context had been that the sentencing decision be based on the facts and circumstances of the defendant, his background, *and his crime*." *Clemons v. Mississippi*, *supra*, 494 U.S. at 748, emphasis added. "It would be a rather strange jurisprudence," *Herrera v. Collins*, ___ U.S. ___, 113 S.Ct. 853, 863 (1993), which allowed a capital-eligible defendant to be sentenced to death without allowing the jury to fully consider whether the specific facts and circumstances of his case justified that sentence.

This Court has established the circumstances surrounding a capital offense as one of the criteria upon which the jury *should* base its penalty determination. *See, e.g., Penry v. Lynaugh*, 492 U.S. 302, 318 (1989); *Booth v. Maryland*, 482 U.S. 496, 502 (1987), overruled on other grounds, *Payne v. Tennessee*, 501 U.S. ___,

111 S.Ct. 2597 (1991); *Jurek v. Texas*, 428 U.S. 262, 274, (1976). Moreover, there is no authority stating or implying that allowing a jury to consider the "circumstances of the offense" as a sentencing factor is unconstitutionally vague. *Jurek*, at 274.

Unlike the case of *Maynard v. Cartwright*, 486 U.S. 356, upon which Petitioners rely, Petitioners were both found death eligible because of one or more valid special circumstances. In Petitioner Proctor's case there are torture murder and two felony murder special circumstances, while in Petitioner Tuilaepa's case there is a felony murder special circumstance, all of which were initially found true beyond a reasonable doubt at the guilt phase in each case. The jury was then allowed to consider *all* of the other relevant factors set forth in California Penal Code section 190.3 *in addition to* the circumstances of the crime in determining whether the appropriate punishment in each case was death or life without the possibility of parole.

Bacigalupo II held that the Penal Code section 190.3 sentencing factors must also meet the dual standards of "specificity and of relevance." 6 Cal.4th at 477; 24 Cal.Rptr.2d at 820. Citing to this Court's Eighth Amendment cases, the California Supreme Court went on to hold that:

> To meet these dual criteria, sentencing factors should not inject into the individualized sentencing determination the possibility of

> "randomness" or "bias in favor of the death penalty." (*Stringer v. Black*, *supra*, 503 U.S. ___, ___ [117 L.Ed.2d at p. 382, 112 S.Ct. 1130 at p. 1139].) Inappropriate for consideration in the sentence selection process would be any aggravating factor that was either "seriously and prejudicially misleading," or that invited "the jury to be influenced by a speculative or improper consideration []," such as the race or political beliefs of the defendant that are without any bearing on moral culpability. (*People* v. *Ramos* (1984) 37 Cal.3d 136, 153 [207 Cal.Rptr. 800, 689 P.2d 430]; *Dawson* v. *Delaware* (1992) ___ U.S. ___ [117 L.Ed.2d 309, 112 S.Ct. 1093].)

Id. at 477; 24 Cal.Rptr.2d at 820.

In applying these two standards to factor (a), the California Supreme Court specifically rejected claims that this sentencing factor: (1) contains no narrowing factor; (2) provides no objective basis for appellate review of a death judgment; or (3) is impermissibly vague under the Eighth Amendment. The court specifically held that:

> Factor (a) uses clearly understandable terms to designate for jury consideration in sentence selection "[t]he circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special

circumstances found to be true. . . ." (§ 190.3, factor (a).) In any criminal case the circumstances of the crime of which the defendant stands convicted are the single most pertinent sentencing consideration. Indeed, by directing the sentencer to consider the circumstances of the capital crime, factor (a) of section 190.3 embodies a consideration that the United States Supreme Court has identified as "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" (*Johnson* v. *Texas*, *supra*, ___ U.S. ___ [125 L.Ed.2d 290, 301; 113 S.Ct. 2658, 2665]; *People* v. *Tuilaepa*, *supra*, 4 Cal.4th at p. 594; *People* v. *Proctor* (1993) 4 Cal.4th 499, 551 [15 Cal.Rptr.2d 340, 842 P.2d 1100].) Therefore, when a California jury considers the circumstances of a defendant's capital crimes for the purpose of making an individualized determination whether life without possibility of parole or death is the appropriate penalty for a defendant already determined to be within the narrowed class of death-eligible murderers, there can be no violation of the Eighth Amendment prohibition against cruel and unusual punishments.

6 Cal.4th at 478-479; 24 Cal.Rptr.2d at 820-821.

Petitioners have not argued in their brief on the merits that the three challenged Penal Code section

190.3 sentencing factors fail to meet the two standards announced in *Bacigalupo II*, although they clearly had the opportunity to do so. Since Petitioners apparently do not dispute this point, there is no basis for finding these challenged sentencing factors to be violative of the Eighth Amendment apart from Petitioners' *Stringer* claim which respondent has already addressed.

B. The "Other Violent Crimes" Factor Set Forth In California Penal Code, Section 190.3, Subdivision (b), Is Both Specific And Relevant On The Punishment Question And It Was Therefore Properly Used To Determine The Appropriate Penalty For Petitioner Tuilaepa

The California Supreme Court held that factor (b) directs the penalty phase jury to specific provable and commonly understood facts about the defendant in a capital crime that may bear on his moral culpability. Evidence of his criminal conduct, especially where acts of violence toward other people are involved, is of the "general type long considered by sentencing authorities" and are particularly relevant to the penalty decision. *Bacigalupo II*, 6 Cal.4th at 478, 24 Cal.Rptr.2d at 821, citing *Payne*, 111 S.Ct. 2597; *Barclay v. Florida*, 463 U.S. 939, 956 (1983).

The California Supreme Court considered the relevance of evidence showing other crimes of violence

admitted under factor (b) and found such evidence to be probative on the issue of penalty in capital cases. Thus, in *People v. Tuilaepa*, 4 Cal.4th 569, 15 Cal.Rptr.2d 382 (1992) the California Court stated:

> It is settled that the "facts and circumstances of the defendant, his background, and his crime" are relevant to the sentencing decision (*Clemons v. Mississippi* (1990) 494 U.S. 738, 748), and the State, within certain limits, has broad latitude to decide how such facts are to be presented and considered at the penalty phase. (*Payne v. Tennessee* (1991) 501 U.S. ___ [115 L.Ed.2d 720, 735]; *Boyde v. California* (1990) 494 U.S. 370, 377.) By the same token, the individualized penalty determination required by the Eighth Amendment makes inevitable application of the sentencer's own values, perceptions, and experiences to the factors the State deems properly relevant. (*Eddings v. Oklahoma* (1982) 455 U.S. 104, 110-112).
>
> Factor (b) focuses the sentencer's attention on other crimes (i.e., punishable offenses) committed by the defendant involving his use or threatened use of force against any person. (*People v. Phillips* (1985) 41 Cal.3d 29, 72; *People v. Boyde, supra*, 38 Cal.3d 762, 776.)

Id., at pp. 594-565; 15 Cal.Rptr.2d at 397-398. Tuilaepa JA 99.

Further, under *People v. Phillips*, 41 Cal.3d 29, 72-73 n. 25, 222 Cal.Rptr. 127, 155 n. 25 (1985), Petitioner Tuilaepa could have requested that the jury consider only specific enumerated other crimes under factor (b) and/or that the jury be instructed on the elements of those crimes. There was no such request by Petitioner Tuilaepa. The California Supreme Court conscientiously and methodically reviewed each alleged incident offered as factor (b) evidence and carefully reviewed the merits of Petitioners' arguments unless the claim had been waived. It found there was "no reasonable possibility the penalty verdict would have been different absent evidence of threats and insults [made by petitioner] against CYA personnel." Tuilaepa JA 93.

With respect to Petitioner Tuilaepa's claim that he was prejudiced by the factor (b) evidence introduced as an aggravating circumstance at his penalty trial, the California Supreme Court held that:

> Our review of the record discloses convincing evidence of all criminal conduct properly admitted under factor (b) – the fight with inmate Gages, the unprovoked assault on another ward outside the infirmary, the assault and robbery of inmate Chatters, and the possession of potentially

dangerous weapons while in CYA custody. There is no indication that an instruction on specific crimes and elements would have changed the jury's assessment of evidence admitted under factor (b) or would have affected the outcome at trial.

Tuilaepa JA 95.

In summary, petitioner Tuilaepa has failed to establish any factual or legal support for his claim that the factor (b) evidence introduced at his penalty trial violated the Eighth Amendment.

C. <u>A Jury Considering The Sentence In A Capital Case May Properly Consider Whether The Defendant's Age Is A Mitigating Or Aggravating Factor Since This Factor Is Clear, Specific, And Relevant To The Penalty Issue</u>

Petitioner Tuilaepa claims that Penal Code section 190.3, factor (i), the defendant's age, is unconstitutionally vague as applied in his case. According to the California Supreme Court, "[f]actor (i) directs the sentencer to consider whether the defendant's age at the time of the crime gives rise to an inference about his relative youth or maturity which in 'common experience or morality . . . might reasonably inform the choice of penalty. . . .'" *People v. Tuilaepa, supra*, 4 Cal.4th at 595, 15 Cal.Rptr.2d at 397.

This factor directs the sentencer's attention "to specific, provable, and commonly understandable facts about the defendant and the capital crime that might bear on his moral culpability." *Id.*, at 595, 15 Cal.Rptr. 2d at 397; *accord People v. Noguera*, 4 Cal.4th 599, 648-649; 15 Cal.Rptr.2d 400, 429 (1992).

In the *Tuilaepa* case the prosecutor argued first and was only allowed to argue once. The format of this argument compelled the prosecutor to anticipate what the defense lawyer would later argue during his closing remarks. Since the prosecutor was not allowed to rebut the defense argument, he therefore had to try and anticipate what the defense would claim was mitigating evidence and argue against it as best he could. This is why the prosecutor argued that *if* the defense argued age was a mitigating factor, the jury should closely examine this claim. Tuilaepa JA 11. The prosecutor merely argued that by the time he committed the charged offenses petitioner Tuilaepa was "old enough" to have been incarcerated; old enough to plan and commit a robbery; and old enough to be held accountable. Tuilaepa JA 12-13. The thrust of the prosecutor's argument was that the jury could not rely on Petitioner's age to "pass this off as the mere folly of youth." Tuilaepa JA 12-13. Thus, the prosecutor did not affirmatively argue that Petitioner Tuilaepa's age was an aggravating factor but merely attempted to show

that the defendant did not deserve lenience because of his age.

In this respect it is the rule under California law that a prosecutor may argue a defendant is less deserving of leniency because of his age, as opposed to more deserving of death. *People v. Rodriguez*, 42 Cal.3d 730, 789; 230 Cal.Rptr. 667, 705 (1986). A defendant's youth has mitigating value only to the extent that his conduct is attributable to his age. *Graham v. Collins*, 950 F.2d 1009, 1231 (5th Cir. 1992) (en bank), *affd. Graham v. Collins*, ___ U.S. ___, 113 S.Ct 892, 895 (1993).

Given his history, the prosecutor's argument regarding how the penalty phase jury should treat a claim that Petitioner Tuilaepa's age was a mitigating factor did not violate the Eighth Amendment. More importantly, allowing a jury in capital case to consider age as a sentencing factor is not barred by the Eighth Amendment. *Cf. Johnson v. Texas, supra*, 113 S.Ct. 2658 (holding that a jury must be able to consider youth as a mitigating factor with no suggestion that evaluation of age as an aggravating factor would violate the Eighth Amendment).

D. <u>There Is No Constitutional Requirement That The Factors Set Forth In California Penal Code Section 190.3 Be Individually Labelled As Either Aggravating Or Mitigating</u>

The California Supreme Court has properly and repeatedly rejected the argument that Penal Code section 190,.3 is unconstitutionally vague because its factors are not individually labelled as either aggravating or mitigating. *See, e.g., People v. Livaditis*, 2 Cal.4th 759, 784; 9 Cal.Rptr.2d 72, 87 (1992); *People v. Medina*, 51 Cal.3d 870, 908-909; 274 Cal.Rptr. 849, 874 (1990); *People v. McLain*, 46 Cal.3d 97, 118; 249 Cal.Rptr. 630, 642 (1988); *People v. Jackson*, 28 Cal.3d 264, 316, 168 Cal.Rptr. 603, 630 (1980). The California Supreme Court recently held that "'the aggravating or mitigating nature of these various factors should be self-evident to any reasonable person within the context of each particular case.'" *People v. Zapien*, 4 Cal.4th 929, 990, 17 Cal.Rptr.2d 122, 157 (1993), quoting *Jackson*, 28 Cal.3d at 316, 168 Cal.Rptr. 603, 630. This Court has also recognized that there is no likelihood that failure to give instructions specifically identifying the mitigating factors can result in an unreliable penalty determination. See *Graham v. Collins, supra*, ____ U.S. ____, 113 S.Ct. at p. 895.

Thus, Petitioner Proctor's challenge to the vagueness of the Penal Code section 190.3 sentencing

factors for failing to label the factors must also be rejected.

III.

THE PROSECUTOR'S ARGUMENT IN PETITIONER PROCTOR'S CASE THAT THE ABSENCE OF A MITIGATING FACTOR AMOUNTS TO AN AGGRAVATING CIRCUMSTANCE DOES NOT VIOLATE THE EIGHTH AMENDMENT SINCE THE JURY WAS PROPERLY INSTRUCTED ON THIS ISSUE

Finally, Petitioner Proctor claims that he is entitled to a reversal and a new penalty trial because the prosecutor briefly argued that the absence of three mitigating factors allowed the jury to consider these factors as aggravation. Petitioner claims that when this error is combined with the instruction that the jury "shall" return death if it found that aggravation outweighed mitigation, there is an unconstitutional exacerbation of the overall vagueness of Penal Code section 190.3 sentencing factors. Respondent disagrees.

In the Proctor case, the California Supreme Court found the challenged portion of prosecutor's argument amounted to *Davenport*[10] error but also found the error was harmless since the jury had been properly instructed on this question. Proctor JA 80. Petitioner's claim that the "shall" instruction creates a

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10. *See People v. Davenport*, 41 Cal.3d 247, 288-290, 221 Cal.Rptr. 794, 821 (1985)

mandatory death penalty statute has similarly been rejected, not only by the California Supreme Court but also by this Court. *Blystone v. Pennsylvania*, *supra*, 494 U.S. 299 and *Boyde v. California*, 494 U.S. 370 (1990).

Petitioner Proctor essentially argues the prosecutor did not correctly identify aggravating and mitigating factors during his closing argument.[11/] This claim raises a question of interpretation of the California statute regarding aggravating factors, but no federal question.

Petitioner virtually ignores several crucial factual aspects of this claim. For example, it should be noted that Petitioner did not object to the prosecutor's remarks and the prosecutor's argument was made before the California Supreme Court had issued its opinion in *People v. Davenport*, finding this type of argument to be improper under state law. It is also important to note that the trial court specifically instructed the jury that the absence of mitigating evidence on a specific factor "of itself does not make that factor an aggravating factor." Proctor JA 80.

The California Supreme Court found the prosecutor's argument to be harmless error under state

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11. In the California Supreme Court Petitioner Proctor merely argued that the Prosecutor committed *Davenport* error as to factors (d), (e), and (f). JA p. 144-145. Petitioner Proctor now claims for the first time that factors (h) and (j) must be added to this list.

statutes and petitioner therefore fails to establish a federal question. *Estelle v. McGuire*, ___ U.S. ___, 112 S.Ct. 475 (1991). The state court carefully and rigorously analyzed Petitioners' claim and found that it lacked merit. Proctor JA 148-153.

Petitioner Proctor also contends that the instruction that the jury "shall" impose death if aggravation outweighs mitigation and the prosecutor's argument increased the vagueness of the Penal Code section 190.3 sentencing factors. Proctor Brief at 24-25. *Boyde v. California*, *supra*, 494 U.S. 370, is dispositive of Petitioner's claim. This Court held in *Boyde* that the "unadorned" factor (k) instruction did not prevent the jury's consideration of section 190.3 mitigating evidence regarding the defendant's of background and character. *Id.*, at 381. This satisfies the constitutional requirement of individualized sentencing in capital cases. *Id.*, at 377, citing *Blystone*, 494 U.S. at 307. In context, the District Attorney's brief argument in the Proctor case that the death penalty was "necessary" or that the jury was "obligated to return a verdict of death" simply contended that the aggravating evidence was overwhelming while evidence of mitigation was insubstantial. Proctor JA 23, 32.

Petitioner has again failed to state a basis for relief.

CONCLUSION

The California Supreme Court's judgments, upholding the convictions and death sentences in both cases, should be affirmed and Petitioners' request for relief from this Court must be denied.

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Respectfully submitted,

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